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RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

REDACTED

THE STATE OF CALIFORNIA, et al.,

Plaintiffs,

v.

INFINEON TECHNOLOGIES AG, et al.

Defendants.

Case No. C-06-04333 PJH

**DEFENDANTS' OPPOSITION TO
PLAINTIFFS' MOTION FOR
CERTIFICATION OF CALIFORNIA AND
NEW MEXICO GOVERNMENTAL
ENTITY CLASSES**

Hearing Date: April 9, 2008
Hearing Time: 9:00 a.m.
Location: Courtroom 3, 17th Floor
Judge: Hon. Phyllis J. Hamilton

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I. INTRODUCTION

Plaintiffs seek to certify broad classes of government entities bringing claims based on purchases of an expansive range of products purchased through diverse means. The proposed classes include entities that purchased products ranging from DRAM modules to personal computers and mainframe computers to printers and networking equipment, by means ranging from multi-state negotiated contracts to individual retail purchases. Class treatment of such disparate claims is inappropriate. Plaintiffs' motion fails because of the lack of common proof, atypical proposed class representatives, inadequacy of at least one of the proposed class representatives, and manageability difficulties.

Most significantly, Plaintiffs lack a consistent and common method of demonstrating the existence and extent to which any alleged overcharge was passed on to the different government entities. It is difficult or impossible to determine whether any purchaser of the various products containing DRAM suffered any injury at all as a result of any supposed rise in the price of DRAM at any given time – let alone that such an injury, if any, was sufficiently similar to justify class treatment as proposed by Plaintiffs. Indeed, Plaintiffs do not and cannot measure the impact of any supposed rise in the price of DRAM on these finished products. That is because, among other reasons, the total amount of DRAM embodied in these products is a very small share of the products' overall cost. Compounding the problem, Plaintiffs' own economist concedes that the different categories of products purchased by members of the proposed class require *at least* six separate analyses: "A separate analysis would be undertaken for each category of computer equipment – to which the plaintiffs have limited their claims – *i.e.*, mainframes and supercomputers, servers and workstations, desktop and notebook computers, networking equipment, printers, and DRAM modules." Preliminary Expert Report of Dr. Kenneth Flamm ("Flamm Report") at 42-43. When factoring in the different channels of sales, brands, and models, the number of separate analyses required jumps from six to at least several hundred and likely many thousand.

Plaintiffs' economist also concedes that there are circumstances in which any overcharge in the price of DRAM would not have been passed on at all to purchases of computers and other end-products. These include circumstances that existed during the class period, including instances:

1 [REDACTED]
2 [REDACTED]
3 [REDACTED]
4 [REDACTED]
5 [REDACTED]
6 • [REDACTED]
7 [REDACTED]

8 Not surprisingly, Plaintiffs ignore the only direct evidence in the record of the practices of OEMs and
9 module manufacturers. [REDACTED]
10 [REDACTED]

11 That testimony directly contradicts Plaintiffs' claim that DRAM price changes were consistently
12 passed on. Courts deny class certification where, as here, plaintiffs cannot establish the fact of injury
13 for some or all of the putative class members.

14 Plaintiffs' motion also suffers from two other infirmities. First, Plaintiffs' only class
15 representative for the State of New Mexico, the County of Sandoval, has shown that it is not an
16 adequate class representative. The County destroyed all of its relevant records of purchases of
17 DRAM or products containing DRAM despite claiming previously that it maintained meticulous
18 records of such purchases made during the period July 2001 through June 2002. But these
19 meticulous records are not available because the County destroyed them sometime *after* Plaintiffs
20 (including the County of Sandoval, who is a named Plaintiff) filed this action in July 2006.

21 Moreover, given the inherent difficulties in class actions with numerous individual issues of
22 fact like this one, the Ninth Circuit has required putative class representatives to present a realistic
23 trial plan. Plaintiffs have not done so here notwithstanding the dizzying array of individual issues
24 raised by their claims.

25 Accordingly, Defendants request that this Court deny Plaintiffs' motion for class certification
26 or, at most, certify only a narrowly-tailored class of California governmental entities that purchased
27 DRAM modules.
28

II. STATEMENT OF FACTS¹

A. Plaintiffs' Proposed Class and Proposed Class Representatives

Plaintiffs have requested that this Court certify a class of governmental entities within the State of California, and another class of governmental entities within the State of New Mexico. *See* Motion for the Certification of California and New Mexico Governmental Entities ("Class Cert. Mot.") at 3. According to the allegations in Plaintiffs' Third Amended Complaint, Plaintiffs seek to recover for alleged overcharges stemming from purchases of a multitude of products containing DRAM, including desktop computers, laptop computers, servers, workstations, supercomputers, networking equipment, printers, and DRAM modules. *See* Third Amended Complaint ("TAC"), ¶ 150 (alleging injury in connection with Plaintiffs' purchases of "DRAM" and "DRAM Containing Products"); *see also* TAC ¶¶ 6, 8, 9, 10, and 34 (defining "DRAM" and "DRAM Containing Products," as those terms are used in the Third Amended Complaint). Plaintiffs' economist, Dr. Flamm, also seeks to include "mainframes" among the categories of products for which Plaintiffs seek recovery here. Flamm Report at 7.

Plaintiffs' proposed class representatives for the proposed California class are the City and County of San Francisco, the County of Santa Clara, and the Los Angeles Unified School District. Far from being "typical" of the government entities they seek to represent, these proposed class representatives are, respectively, the fourth-largest city in California by population, the sixth-largest county in California by population, and the largest school district in California by enrollment. *See* Guerin-Calvert Report ¶14; *id.*, Appendix at 38-53. The large size of these entities affords them procurement options that are not available to small government entities; for example, the City and County of San Francisco has developed its own "Computer Store" comprised of seven resellers who hold master contracts with San Francisco. *See* Declaration of Naomi Kelly (submitted Nov. 21, 2007 in support of Plaintiffs' Motion for Class Certification), ¶ 4. Moreover, none of these proposed

¹ All deposition excerpts, lettered exhibits and declarations in support of the Defendants' Opposition are attached to the Declaration of G. Charles Nierlich except the Declaration of Defendants' expert Margaret E. Guerin-Calvert ("Guerin-Calvert Report"), which is being submitted separately.

1 class representatives has produced adequate documents detailing its purchases as propounded by
2 defendants, nor do any claim to have adequate knowledge of the procurement practices and policies
3 of the entities they seek to represent.

4 The California governmental entities that Plaintiffs seek to represent range from counties to
5 school districts to municipalities and state agencies. The California counties range from about 1,200
6 residents to over 9.5 million residents; the school districts range from one with 133 students to one
7 with more than 700,000 students; and state agencies have budgets ranging from \$2.2 million
8 (Veterinary Medical Board) to \$14 billion (Department of Transportation). *See* Guerin-Calvert
9 Report, ¶ 14; *id.*, Appendix at 38-65.

10 Plaintiffs' only proposed class representative for the proposed New Mexico class is the
11 County of Sandoval. The County of Sandoval did not produce a single document showing a purchase
12 of DRAM or a product containing DRAM during the class period – because the County of Sandoval
13 admits having destroyed its purchasing records for the class period *after* this litigation started. *See*
14 Nierlich Decl., Exh. A (Deposition of Cassandra Herrera) at 79:10-12; 31:2-32:11. The New Mexico
15 governmental entities that Plaintiffs seek to represent also include counties, school districts,
16 municipalities, and various state and local agencies. New Mexico counties range in population from
17 718 to over 600,000; school districts range from 71 students to more than 93,000; and the budgets of
18 state agencies in New Mexico range from just over \$1 million to over \$229 million. *See* Guerin-
19 Calvert Report, ¶ 14; *id.*, Appendix at 66-82. These are only a few of the many differences among
20 the proposed class members.

21 Not surprisingly, the methods used by these various entities to purchase DRAM or products
22 containing DRAM also vary widely. Among other options, California and New Mexico entities may
23 avail themselves of contracts through the Western States Contracting Alliance (“WSCA,” a multi-
24 state purchasing consortium); they may purchase through various state or federal contracts with price
25 lists that are effective for varying periods of time; they may use other forms of competitive bidding;
26 and they may purchase directly from any number of resellers or retailers. *See* Guerin-Calvert Report
27 ¶ 24; *see also, e.g.*, Declaration of Cassandra Herrera, ¶ 7 (submitted Nov. 21, 2007 in support of
28 Plaintiffs' Motion for Class Certification) (listing methods of procurement available to New Mexico

1 governmental entities, including use of WSCA contracts); *but see, e.g.*, Nierlich Decl., Exh. A
 2 (Herrera Depo.) at 79:18-20 (testifying that the County of Sandoval never used WSCA contracts).
 3 Thus, there are wide differences in the prices paid among proposed class members for the same
 4 computer (or other products containing DRAM).

5 **B. Defendants and the Distribution of DRAM**

6 This Court is well familiar with the background of the DRAM litigation. As this Court
 7 knows, some but not all of the Defendants entered guilty pleas stating that they engaged in episodic
 8 communications with competitors regarding the DRAM prices they charged to six specific OEMs
 9 “during certain periods of time” from April 1999 through June 2002, with “varying levels of
 10 effectiveness” in raising those prices. *See, e.g.*, Plea Agreement of Infineon Technologies AG,
 11 *United States v. Infineon Technologies AG*, No. 04-299 (PJH) (Sept. 14, 2004), at ¶¶ 2, 4; Plea
 12 Agreement of Hynix Semiconductor, Inc., *United States v. Hynix Semiconductor, Inc.*, No. CR 05-
 13 249 PJH (Apr. 20, 2005), at ¶¶ 2, 4. A large number of manufacturers other than the Defendants here
 14 manufactured up to nearly 30% of the DRAM sold in the U.S. during portions of that period. *See*
 15 Guerin-Calvert Report at ¶112. Defendants generally sold their DRAM directly to OEMs or to
 16 module makers. The module makers then resold DRAM to OEMs, distributors, retailers, and end
 17 users. The OEMs, in turn, sold computers to distributors, retailers and end users. Additional layers
 18 of distribution included brokers, consultants and resellers of various kinds. *See* Guerin-Calvert
 19 Report at ¶93.

20 **III. ARGUMENT**

21 Plaintiffs bear the burden of meeting each of the requirements of Rule 23(a) — numerosity,
 22 common issues, typicality, and adequacy of representation — along with at least one requirement of
 23 Rule 23(b). *See Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1186, amended, 273 F.3d 1266
 24 (9th Cir. 2001). For monetary relief, Plaintiffs must meet the requirements of Rule 23(b)(3),
 25 including proof that common issues predominate and that the proposed class is superior to alternative
 26 means of adjudicating the controversy. A court must deny certification if any of the requirements of
 27 Rule 23 is not met. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 622 (1997).

28

1 Rule 23 requires the Court to conduct a “rigorous analysis” and “probe behind the pleadings”
 2 to determine whether class treatment is appropriate. *Gen. Tel. Co. of the Southwest v. Falcon*, 457
 3 U.S. 147, 160-61 (1982). As this Court has held, matters beyond the pleadings may be considered
 4 “to ascertain whether the asserted claims or defenses are susceptible of resolution on a class wide
 5 basis.” *In re DRAM Antitrust Litig.*, 2006 U.S. Dist. LEXIS 39841, *27 (N.D. Cal., June 5, 2006).

6 Nothing in Rule 23 requires the Court to accept as true the allegations of the complaint. *See*,
 7 *e.g.*, *Szabo v. Bridgeport Machs., Inc.*, 249 F.3d 672, 675 (7th Cir. 2001) (“The proposition that a
 8 district judge must accept all of the complaint’s allegations when deciding whether to certify a class
 9 cannot be found in Rule 23 and has nothing to recommend it”).

10 Similarly, the opinions of Plaintiffs’ expert are not “facts” and, when unsupported by
 11 evidence, cannot establish the requirements of Rule 23. As the Supreme Court explained: “Expert . .
 12 . . . testimony is useful as a guide to interpreting market facts, but it is not a substitute for them.”
 13 *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 242 (1993). Expert
 14 testimony is of no value when it “is not supported by sufficient facts to validate it in the eyes of the
 15 law, or when indisputable record facts contradict or otherwise render the opinion unreasonable.”
 16 *Weisgram v. Marley Co.*, 528 U.S. 440, 454 (2000) (quoting *Brooke Group*). Courts regularly deny
 17 class certification in antitrust cases where the Plaintiffs rely on factually unsupported economic
 18 experts.²

19 **A. Plaintiffs Cannot Show That Common Issues Predominate Because The Claims**
 20 **Of The Members of the Proposed Class Who Purchased DRAM Indirectly Raise**
 21 **Individual Issues Of Proof**

22 To obtain certification under Rule 23(b)(3), Plaintiffs must demonstrate that issues subject to
 23 common, classwide proof will predominate over issues that involve individualized proof. *Poulos v.*
 24 *Caesar’s World Inc.*, 379 F.3d 654, 664 (9th Cir. 2004). Here, impact and injury will require
 25 individual proof for each class member. Accordingly, class certification should be denied.

26
 27 ² *See, e.g. Weisfeld v. Sun Chem. Corp.*, 84 Fed. Appx. 257, 262 (3rd Cir. 2004) (affirming
 28 denial of class certification); *In re Agricultural Chems. Antitrust Litig.*, 1995-2 Trade Cas.
 (CCH) P71, 197 (N.D. Fla. 1995) (denying class certification); *Global Minerals & Metals*
Corp. v. Sup. Ct., 113 Cal. App. 4th 836, 856-57 (2003) (vacating class certification).

1 **1. Class Certification Should Be Denied Because Plaintiffs Cannot Show**
 2 **Impact On A Classwide Basis With Common Proof**

3 When injury cannot be shown on a classwide basis with common proof, certification
 4 should be denied.³ Plaintiffs have not demonstrated that injury – sometimes referred to as
 5 “impact” or “fact of damage” – can be shown with common proof on a classwide basis. Proof
 6 is common only if “the same evidence will suffice for each member to make a prima facie
 7 showing.” *Blades v. Monsanto*, 400 F.3d at 566.

8 For indirect purchasers, injury requires proof that Defendants’ alleged overcharges
 9 were “passed on” to them by intermediate sellers. But the “pass-on” to any particular class
 10 member is dependent on the pricing decisions made by the various intermediate sellers
 11 between the Defendants and the proposed class members. Courts throughout the country
 12 repeatedly have refused to certify indirect purchaser classes because of the lack of common
 13 proof of “pass on” through various resellers.⁴

14
 15 ³ *Amchem*, 521 U.S. at 623-25; *Blades v. Monsanto*, 400 F.3d 562, 566, 572 (8th Cir. 2005)
 16 (affirming denial of class certification where plaintiffs “cannot prove classwide injury with
 17 proof common to the class”); *Bell Atl. Corp. v. AT&T Corp.*, 339 F.3d 294, 302 (5th Cir.
 18 2003) (“we have repeatedly held that where fact of damage cannot be established for every
 19 class member through proof common to the class, the need to establish antitrust liability for
 20 individual class members defeats Rule 23(b)(3) predominance”); *Weisfeld v. Sun Chem.*
 21 *Corp.*, 210 F.R.D. 136, 144 (D.N.J. 2002) (“Plaintiff must establish that each class member
 22 has, in fact, been injured by the alleged conduct.”), *aff’d* 84 F.3d Appx. 257 (3d Cir. 2004).

23 ⁴ *A&M Supply Co. v. Microsoft Corp.*, 654 N.W.2d 572 (Mich. Ct. App. 2002) (operating
 24 system); *Execu-Tech Business Sys., Inc. v. Appleton Papers, Inc.*, 743 So. 2d 19 (Fla. Ct. App.
 25 1999); *Keating v. Philip Morris, Inc.*, 417 N.W.2d 132 (Minn. Ct. App. 1987) (cigarettes);
 26 *Melnick v. Microsoft Corp.*, No. CV-99-709, CV-99-752 (Me. Super. Ct.) (operating system);
 27 *Derzon v. Appleton Papers*, No. 96-CV-3678, 1998 WL 1031504 14 at 7-8 (Wis. Cir. Ct.,
 28 July 7, 1998) (fax paper: “Constructing economic models in order to reach generalized
 conclusion about economic behavior is one thing; using such theories to prove that every class
 member has suffered a loss and the amount of that loss is quite another.” (italics in original));
Ashley v. Archer Daniels Midland Co., No. CV 95-336-R (Ala. Cir. Ct., DeKalb Co., Mar.
 13, 1998) (lysine); *Karofsky v. Abbott Labs.*, 1997 Me. Super. LEXIS (Oct. 15, 1997)
 (prescription drugs); *Wilcox v. Archer-Daniels-Midland Co.*, No. 96- 17 82473-CP (Mich.
 Cir. Ct., Ingham Co., Sept. 29, 1997) (high-fructose corn syrup and citric acid); *Wood v.*
Abbott Labs., 1997-2 Trade Cas. (CCH) P72,014, 1997 WL 824019 (Mich. 18 Cir. Ct. Sept.
 11, 1997) (prescription drugs); *Kerr v. Abbott Labs.*, 1997-1 Trade Cas. (CCH) P71,776, 1997
 WL 314419 (Minn. Dist. Ct. Feb. 19, 1997) (prescription drugs); *Durden v. Abbott Labs.*, No.
 CV 93-663 (Ala. Cir. Ct., Calhoun Co., Jan. 16, 1996) (infant formula); *Harbin v. Johnson &*
Johnson Vision Prods., No. CV 94-2872 (Ala. Cir. Ct., Mobile Co., Sept. 12, 1995) (contact
 lenses); *Fischenich v. Abbott Labs.*, No. MC-94-6868 (Minn. Dist. Ct., Hennepin Co., May

[Footnote continued on next page]

This Court also recently determined in a related case that indirect purchasers of DRAM did not meet the standing requirements enunciated in *Assoc. Gen. Contractors of Cal. v. Cal. State Council of Carpenters*, 459 U.S. 519 (1983) (“AGC”), and thus lacked antitrust standing to assert claims under several state laws for claims based on the purchases of products in which DRAM is a component. *See* Order Granting Motion to Dismiss in Part and Denying Motion to Dismiss in Part, MDL No. 1486, *In re Dynamic Random Access Memory (DRAM) Antitrust Litigation* (All Indirect Purchaser Actions) (Jan. 29, 2008) at 4-15. Defendants believe that the same conclusion will apply to the claims of all of the Plaintiffs here, and intend to raise the issue at an appropriate time for determination as to all of the Plaintiffs (and not just California and New Mexico, who are the moving parties for the instant motion for class certification). For present purposes, however, there is no need to address the question of whether Plaintiffs satisfy the standing requirement of AGC because the requirements of Rule 23 preclude class certification.

2. Plaintiffs Do Not Provide Any Means to Identify and Exclude Customers for Whom No Impact At All Can Be Shown

In their motion for class certification, Plaintiffs rely heavily on this Court’s analysis in the direct purchaser class certification motion in the DRAM MDL litigation. But this Court has not previously certified an indirect purchaser class, for which plaintiffs would be required to establish pass-on on a classwide basis using common proof. As discussed in more detail in the Guerin-Calvert Report, there are many reasons that it is difficult or impossible to use a common methodology to estimate pass-on at any given price. There are also a variety of reasons why pass-on could be zero for substantial portions of the proposed class.

[Footnote continued from previous page]

26, 1995) (infant formula); *In re Brand Name Prescription Drugs Antitrust Litig.* (*Price v. American Home Prods.*), 1994 WL 663590 (N.D. Ill. Nov. 18, 1994) (prescription drugs); *McCarter v. Abbott Labs.*, No. CV 9 1-050 (Ala. Cir. Ct., Shelby Co., Apr. 9, 1993) (infant formula); *City of St. Paul v. FMC Corp.*, 1990-2 Trade Cas. (CCH) P69, 283, 1990 WL 259683 (D. Minn. Nov. 4, 1990) (caustic soda and chlorine); *Borden, Inc. v. Universal Indus. Corp.*, 88 F.R.D. 708, 710 (N.D. Miss. 1981) (sugar).

1 First, in the direct purchaser DRAM litigation, plaintiffs' expert conceded that there
 2 were periods within the alleged conspiracy where prices were competitive and thus no harm
 3 was incurred. *See* Nierlich Decl., Exh. E (Expert Report of Roger Noll (8/25/06)) at 5. There
 4 often is no way to determine whether a particular PC or other product contains DRAM
 5 manufactured during those periods. Indeed, even PCs alone and the DRAM in them are sold
 6 through multiple channels, taking varying amounts of time up to months. [REDACTED]

7 [REDACTED]
 8 [REDACTED] Without an ability to make
 9 this determination by common proof, class-wide impact cannot be determined. Dr. Flamm
 10 does not explain how one might accurately distinguish products sold over the period of the
 11 alleged conspiracy that contained competitively priced DRAM.

12 Second, [REDACTED]
 13 [REDACTED]
 14 [REDACTED]
 15 [REDACTED] *See* Guerin-Calvert Report at ¶ 102; *see also* Flamm Depo at
 16 232:17-233:15.

17 Third, certain manufacturers depend upon forecasts rather than actual prices of
 18 components in deciding the final price of the computer to the reseller, retailer or consumer
 19 depending on the supply chain. *See* Guerin-Calvert Report at ¶ 111. [REDACTED]
 20 [REDACTED]
 21 [REDACTED]
 22 [REDACTED] *See id.*; *see also* Nierlich Decl., Exh. F (article dated
 23 6/8/01 from the Wall Street Journal) (observing that computer manufacturers other than Dell
 24 did not have flexibility to adjust PC prices to reflect changes in component costs).

25 Fourth, [REDACTED]
 26 [REDACTED]
 27 [REDACTED]
 28 [REDACTED]

[REDACTED]

generally remained stable even during periods of dramatic movements in DRAM prices.⁵

Moreover, while the class is defined in terms of sales by the defendants named here, Defendants did not account for the entire DRAM sales over the period and did not even account for a constant proportion over the period of the alleged collusion. *See* Guerin-Calvert

⁵ Any suggestion by Plaintiffs that pass-on could take place in other ways, *e.g.*, through changes in configuration and other components, is even less susceptible to class-wide proof.

Report at ¶ 112. Given the variable proportion of non-defendant sales and the issues discussed concerning variable lags, it would be impossible to determine whether an end-user purchased a computer or module containing DRAM supplied by a defendant or a non-defendant.

In short, Plaintiffs have not established that any specific class of purchasers has suffered any injury at all as a result of the purchase of products containing DRAM. To the contrary, by including such a wide variety of products containing DRAM and relying on broad generalizations, Plaintiffs have likely ensured that their proposed class will include claims for which there was no pass on to the end user of any increase in the price of DRAM.

3. Plaintiffs Cannot Show Pass-on On A Classwide Basis Here Because of the Vast Differences Among the Products Containing DRAM that Plaintiffs Have Placed at Issue Here

Plaintiffs' request for class certification here differs in a number of ways from previous motions by direct purchasers of DRAM and even the indirect purchasers' class certification motion, which was limited to purchasers of personal computers containing DRAM. One key difference is that Plaintiffs here seek to recover based on purchases of a number of different types of products containing DRAM, including personal computers, printers, networking equipment, mainframes, and DRAM modules. *See* TAC, ¶ 150 (alleging injury in connection with Plaintiffs' purchases of "DRAM" and "DRAM Containing Products"); *see also* TAC ¶¶ 6, 8, 9, 10, and 34 (defining "DRAM" and "DRAM Containing Products" to include various products including desktop computers, notebook computers, printers, networking equipment, supercomputers, and DRAM modules). The different products containing DRAM that are at issue would have different pass-on rates (or even zero pass-on), precluding any determination or quantification of classwide impact.

The cost of DRAM in a product containing DRAM is generally only a small fraction of the total price of the product, and that fraction varies at different times. Indeed, DRAM accounts for only 0.3% of the cost of a supercomputer on average during 2000-2002, less than 4% of the cost of a printer on average during that time period, and no more than 17% of the price on average during that time period for any of the products containing DRAM identified

1 by Plaintiffs other than DRAM modules. *See* Guerin-Calvert Report, Appendix at 84.

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9 But the pass-on rate is not 100% for every product – or perhaps any product – at issue
10 here. Plaintiffs also cannot show that there is any other common figure for all of the various
11 products containing DRAM that are at issue here. Indeed, *any* pass-on rate may not be
12 subject to determination for many of the products at issue here.

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17 A brief review of the broad categories of products at issue here shows that pass-on
18 rates vary dramatically across as well as within categories of products containing DRAM. To
19 take one example, supercomputers are more specialized than other types of computers, and
20 are typically designed to solve a single class of problems. *See* Guerin-Calvert Report ¶ 54.
21 As a result, the design and price of one supercomputer may vary substantially from another,
22 and there is no basis to conclude that any two supercomputers – let alone all of them – would
23 have the same pass-on rate. *See id.*, ¶ 55. Personal computers also vary in size, design,
24 technological complexity, fault resistance, and end-use requirements, and thus are subject to
25 different supply and demand conditions which will affect the pass-on rates, if any, for
26 different personal computers. *See id.*, ¶ 59. To take yet another two examples, the category
27 of networking equipment includes repeaters, bridges, routers, hubs, switches, and gateways,
28 with prices ranging from under \$100 to over \$20,000, and the category of printers includes

almost 2,000 different products with prices ranging from about \$10 to over \$30,000. *See id.* ¶¶ 75 and ¶¶ 80-82. Dr. Flamm does not explain – and there is no reason to believe – that these myriad different products would be subject to similar (or any) pass-on, especially given the small portion of the overall product cost attributable to DRAM.⁶ *See id.*, ¶ 99.

Indeed, even in the category of DRAM modules, where DRAM accounts for a substantial portion of the total price of the product, the rate of pass-on is dependent on supply and demand conditions in the downstream markets and thus cannot be applied broadly across or within categories. As Ralph Kaplan, Executive Vice President and General Manager of DRAM module manufacturer Viking Interworks has testified, “The price at which Viking sold its modules, and thus whether and to what extent Viking recovered any increases in its DRAM costs, depended on competitive conditions in the module market, including demand for modules, changes in prices of other materials, and the terms of contracts (purchase orders) under which Viking sold modules to OEMs and other customers.” Nierlich Decl., Exh. G (Declaration of Ralph Kaplan) at ¶ 11. In other words, even when DRAM is a substantial portion of the cost of a product containing DRAM, the amount of any pass-on (or even whether there was any pass-on at all) depends on the supply and demand conditions at any given time in the downstream market. The ability of a fluctuation in the price of DRAM to affect the price of a product containing DRAM would, of course, be even more reduced for those products where the portion of the price of the product containing DRAM that is attributable to DRAM is lower.

Plaintiffs’ class certification expert, Dr. Flamm, concedes that the different categories of products require *at least* six separate analyses: “A separate analysis would be undertaken for each category of computer equipment – to which the plaintiffs have limited their claims –

⁶ This analysis is complicated further by the fact that the supply chain to manufacture many of these products include multiple levels (which also vary within and across product categories). Each level of the supply chain adds a time lag that may affect any pass-on of any increase or decrease of the price of DRAM. Moreover, as one multiplies the pass-on at any given level with the pass-on at another level (assuming that each level in the supply chain does not pass on 100% of any increase or decrease in the cost of DRAM), the ultimate pass-on rate to the end user will be even smaller. *See* Guerin-Calvert Report ¶ 97.

1 i.e., mainframes and supercomputers, servers and workstations, desktop and notebook
 2 computers, networking equipment, printers, and DRAM modules.” Flamm Report at 42-43.
 3 In fact, as Dr. Guerin-Calvert explains in her report, there are likely hundreds, if not
 4 thousands, of potential combinations to consider. For example, if one considers a simple
 5 example with six different product groups (assuming one could combine the groups together
 6 as Plaintiffs claim), five channels for sales, five brands of products, and three models, there
 7 would be 450 combinations to consider (6 products x 5 channels x 5 brands x 3 models). *See*
 8 Guerin-Calvert Report ¶33. As one expands the number of products, channels, brands, and
 9 models to be consistent with the real world, the number of combinations becomes
 10 overwhelming to any kind of potential classwide approach.

11 **4. The Wide Variety of Customers and Their Methods of Acquiring DRAM**
 12 **or Products Containing DRAM Contradict Plaintiffs’ Broad**
 13 **Generalizations About Procurement and Pass-on**

14 The proposed class members here vary dramatically in size and scope – from counties
 15 of about 1,000 residents to counties of more than 1 million, cities of fewer than a hundred
 16 people to cities of more than half a million, and state agencies with budgets of one or two
 17 million dollars up to state agencies with budgets of hundreds of millions or billions of dollars.
 18 Given these differences, it should come as no surprise that these various state and local
 19 governmental entities used a variety of methods to purchase DRAM and products containing
 20 DRAM, from multi-state long-term contracts to various forms of competitive bidding to
 21 purchases from retail stores. Notwithstanding this heterogeneity of customer and buying
 22 method, Plaintiffs assert that pass-on rates for DRAM price increases experienced by these
 23 proposed class members should be “very similar.” But the facts belie this simple assertion:
 24 different entities pay different amounts for the same product depending on their size and
 25 method of procurement, and even under a similar purchasing method such as long-term
 26 contracts, the prices actually paid (and thus the potential for pass-on) vary substantially.

27 The California governmental entities that Plaintiffs seek to represent range from the
 28 very small to the very large, and thus have substantially different buying and bargaining
 power. For example, the smallest county in California by population is Alpine County, which

1 has about 1,180 resident. *See* Guerin-Calvert Report ¶ 14. The largest county in California
2 by population is Los Angeles County, which has nearly 10 million residents. *See id.* The
3 range for the size of public colleges and universities is similarly dramatic, from 700 students
4 at Lassen College to more than 38,000 at UCLA. *See id.* There should be no dispute that
5 Lassen College and UCLA would purchase different volumes of products containing DRAM,
6 and thus may receive different pricing and other terms. The New Mexico entities that
7 Plaintiffs seek to represent are similarly diverse, ranging from Harding County with 718
8 residents to Bernalillo County with over 615,000, and school districts with enrollments
9 ranging from fewer than 100 students to more than 90,000. *See id.* Again, it strains credulity
10 to argue that these varying entities will necessarily experience the same (or any) rate of pass-
11 on of any increase in the price of DRAM. In addition, these varying entities use a variety of
12 methods to purchase DRAM or products containing DRAM, ranging from the multi-state
13 contracts through the Western States Contracting Alliance (WSCA) to the local competitive
14 bidding to individual purchases from retail stores like Office Max. *See id.*, ¶ 24.

15 Plaintiffs' expert, Dr. Kenneth Flamm, opines that "an economist would conclude that
16 prices for computer equipment purchased by all other government entities in both California
17 and New Mexico were determined by comparable market conditions and should be quite
18 comparable, and therefore that pass through rates for DRAM price increases into computer
19 equipment prices paid by state and local government entities would also be very similar."
20 Flamm Report at 47. Dr. Flamm does not support these broad generalizations, and the
21 testimony suggests otherwise. For example, the Chief Procurement Officer for the Los
22 Angeles Unified School District testified that, not surprisingly, different school districts may
23 have paid different prices for the same product depending on their method of procurement.
24 Nierlich Decl., Exh. D (Deposition of Duane Johnson) at 84:24-85:11.

25 That these differences preclude classwide proof is confirmed by the undeniable
26 empirical fact that different Plaintiffs paid different prices for the same product, depending on
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1 the procurement method selected. *See* Guerin-Calvert Report ¶¶ 26-28. Plaintiffs' argument
 2 that pass-on may be demonstrated by common proof flies in the face of the facts.⁷

3 5. Plaintiffs' Reliance on the *Microsoft* Cases Is Misplaced

4 Plaintiffs seek to avoid the many cases refusing to certify indirect purchaser classes
 5 due to the lack of common proof of pass on through various resellers by analogizing to state
 6 court rulings in the follow-on private antitrust actions brought against Microsoft after
 7 judgment in a federal enforcement action. *See* Class Cert Mot. at 13. In those cases, plaintiffs
 8 filed antitrust class actions on behalf of consumers who had bought Windows indirectly, by
 9 buying a personal computer that incorporated Windows as the operating system. Here,
 10 plaintiffs argue that the state courts in those actions "predominately determined that impact
 11 could indeed be demonstrated to prove impact on a class-wide basis" and conveniently
 12 dismiss those state court decisions which denied certification. *Id.* at 13-15. In support of
 13 their arguments, plaintiffs rely on a 2005 article from the Journal of Competition Law &
 14 Economics. *Id.* at 15 (citing William H. Page, *Class Certification in the Microsoft Indirect*
 15 *Purchaser Litigation*, J. Comp. L. & Econ. (June 2005) 303, 310) ("Page"). This article is
 16 helpful, but not for the reasons plaintiffs cite.

17 First, the author of the article points out that state courts have shown striking
 18 differences in their approach to the certification inquiry associated with the *Microsoft* indirect
 19 purchaser actions. *Id.* at 306. The many differences in these approaches – a product of
 20 differences in state laws as well as different states' approaches to the class certification
 21 inquiry generally – underscore that the conclusions of these state courts provide little insight
 22 for the purposes of a federal court applying federal law regarding class certification.

23 Second, the author of the article notes that the *Microsoft* litigation is not necessarily
 24 instructive for indirect purchaser actions generally because the unique factual circumstances

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 26 ⁷ The wide variety of prices paid by different customers, the methods of purchasing, the types
 27 of products purchased, and the amount of pass-on (if any) of any alleged overcharges to any
 28 customer would make it impossible for any purported class representative, including the
 purported class representatives here, to be "typical" of the members of the putative class, and
 thus class certification should be denied for this reason as well. *See* Fed. R. Civ. P. 23(a)(3).

1 are unlikely to be present in other indirect purchaser actions. *Id.* at 332. Specifically, the
2 author states that certification of Microsoft indirect purchaser classes by some state courts,
3 and particularly the conclusions of some of those courts that it was possible to adequately
4 show proof of impact on a classwide basis, was likely rooted in three factors: (1) there was
5 only a single seller of Windows; (2) a relatively small number of intermediate levels of
6 distribution that were generally competitive; and (3) relatively few purchases of software by
7 each class member. *Id.* In contrast, here, (1) there are many sellers of DRAM, not all of
8 which are defendants in this case; (2) there are a large number of intermediate levels of
9 distribution; and (3) many class members likely made large numbers of purchases. Moreover,
10 the Plaintiffs here do not necessarily have a direct relationship with the Defendants, unlike the
11 plaintiffs in the *Microsoft* cases, who were licensees of Microsoft's software. These stark
12 differences between the facts presented by the *Microsoft* indirect purchaser actions and this
13 case underscore why plaintiffs cannot use common proof to prove classwide impact for their
14 proposed class of indirect purchasers.

15 Finally, plaintiffs rely on the article for their contention that this Court should consider
16 the fact that California and New Mexico are "sanguine" states which adopt the view of the
17 dissent in *Illinois Brick* and, as such, would be more likely to grant certification of this
18 indirect purchaser action. Class Cert Mot. at 15. For the reasons discussed above, a state
19 court's decision on certification in the context of the facts presented in *Microsoft* is of little
20 utility in analyzing plaintiffs' ability to prove classwide impact with common proof in this
21 case, as required by Rule 23 of the Federal Rules of Civil Procedure. Indeed, the author of the
22 article plaintiffs rely on for this "skeptical/sanguine" distinction posits that the state court
23 decisions granting certification in the *Microsoft* indirect purchaser actions appeared to be
24 caused by "a kind of snowball effect – later cases cited earlier ones as precedent, and
25 characterized the contrary decisions in *A&M* and *Melnick* as aberrations." Page at 325. As to
26 New Mexico, Plaintiffs' suggested "shortcut" is particularly inappropriate because that state's
27 courts have certified only one indirect purchaser class – in the *Microsoft* action.

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B. The Proposed New Mexico Class Representative Is Not Adequate Because the County of Sandoval Admits Destroying Its Only Records of Purchases of DRAM or Products Containing DRAM During the Class Period

The proposed New Mexico class representative is also inadequate under Rule 23(a)(4) because it destroyed all of its remaining records of purchases of DRAM *after* filing this action. Rule 23(a)(4) of the Federal Rules of Civil Procedure requires that the named parties “will fairly and adequately protect the interests of the class.” Fed R. Civ. P. 23(a)(4); *see also Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 625 (1997). “The adequacy inquiry under Rule 23(a)(4) serves to uncover conflicts of interest between named parties and the class they seek to represent.” *Amchem*, 521 U.S. at 625. Because all members of the class are bound by the res judicata effect of the judgment, a principal factor in determining the appropriateness of class certification is “the forthrightness and vigor with which the representative party can be expected to assert and defend the interests of the members of the class.” *Mersay v. First Republic Corp. of America*, 43 F.R.D. 465, 470 (S.D.N.Y. 1968). Indeed, in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 549 (1949), the Supreme Court characterized the responsibility that a putative class representative has to the members of the class as “one of a fiduciary character” that is “dependent on his diligence, wisdom and integrity.” Accordingly, the Court explained that a class representative must meet “standards of responsibility, liability and accountability” to protect the class he seeks to represent. *Cohen*, 337 U.S. at 550.

The only class representative for the proposed New Mexico class is the County of Sandoval. At a deposition on December 20, 2007, the designated witness for the County of Sandoval testified that as of December 2006 – several months after the plaintiffs including the County of Sandoval filed their original complaint in this action – the County of Sandoval maintained “requisition forms, purchase orders, invoices, quotes, and contracts” relating to purchases by the County of Sandoval of products containing DRAM. Nierlich Decl., Exh. A (Herrera Dep.) at 78:4-11. However, the County of Sandoval no longer maintained these documents as of December 2007. *Id.* at 76:10-17 (testifying that documents are currently maintained only back to the 2002-03 fiscal year, which started on July 1, 2002). Cassandra Herrera, the designated deponent for the County of Sandoval, admitted that she

1 ordered that the documents for the 2001-02 fiscal year, including requisition forms, purchase orders,
2 and invoices showing purchases of products containing DRAM, be destroyed. *Id.* at 79:10-12.

3 As a result of the destruction of requisition forms, purchase orders, invoices, quotes, and
4 contracts showing purchases of DRAM or products containing DRAM by the County of Sandoval,
5 the entire production of documents by the County of Sandoval was limited to a total of fifteen pages:
6 a document entitled General Financial Management Policies and Procedures that was not operative
7 during the class period, and a general description of Ms. Herrera's job responsibilities. Plaintiffs
8 produced no documents whatsoever from which they could assess whether any purchases of DRAM
9 or products containing DRAM by the County of Sandoval even occurred, let alone whether those
10 purchases were in some way typical of the proposed class.

11 Where, as here, the putative class representative has destroyed documents that are
12 undoubtedly relevant and central to the claims it seeks to bring on behalf of its proposed class, such
13 destruction raises a host of issues regarding that class representative's adequacy to represent the class.
14 First, without these documents, there is no way for the Court to determine that the named plaintiff's
15 claim and the class claims are "so interrelated that the interests of the class members will be fairly
16 and adequately protected in their absence." *General Tel. Co. of Southwest v. Falcon*, 457 U.S. 147,
17 157, n.13. This raises serious issues as to whether the claims asserted by the County of Sandoval are
18 typical or common with those of the class members it seeks to represent. Second, if the County of
19 Sandoval were allowed to represent the proposed New Mexico class, its destruction of relevant
20 documents after the filing of the complaint in this action would raise "serious concerns as to [the
21 County's] credibility at trial." *Savino v. Computer Credit, Inc.*, 164 F.3d 81, 87 (2d Cir. 1998)
22 (holding that district court did not abuse its discretion in denying certification on the grounds that
23 proposed representative would be inadequate because of questions regarding his integrity).

24 Third, and relatedly, the County of Sandoval's admitted destruction of these relevant
25 documents will likely subject it to unique defenses that would not necessarily be applicable to other
26 class members. *Weinstein v. American Biomaterials Corp.*, 123 F.R.D. 442, 466 (S.D.N.Y. 1988)
27 (denying motion for class certification, in part, because putative class representative was subject to
28 defenses unique to him). At a minimum, the County's actions could result in the Court applying an

adverse inference sanction against the County. *See, e.g., Clark Construction Group, Inc. v. City of Memphis*, 229 F.R.D. 131, 141 (W.D. Tenn. 2005) (imposing adverse inference sanction against party who negligently destroyed documents directly relevant to the claims at issue). The Court might also determine that the action should be dismissed based on the County's actions. *White v. Office of the Public Defender of the State of Maryland*, 170 F.R.D. 138, 152-153 (D. Md. 1997) (dismissing suit with prejudice based on plaintiff's destruction of documents clearly relevant to the litigation). Because the destroyed documents constitute a significant portion of the proof the County would be required to prove its damage claim, either of these outcomes would be detrimental the interests of the proposed class members and underscores an irreconcilable conflict between the interests of the proposed class representative and the proposed class. Under these circumstances, the County of Sandoval does not meet the "standards of responsibility, liability and accountability" set out by the Supreme Court and class certification of the New Mexico class should be denied on the grounds that the proposed class representative is inadequate to protect the class he seeks to represent. *Cohen*, 337 U.S. at 550.

C. The Proposed Class Presents Significant Manageability Issues

Courts routinely reject indirect purchaser classes because the plaintiffs failed to demonstrate that the proposed class action would be manageable.⁸ Given the inherent difficulties in class actions with numerous individual issues of fact, courts often require putative class representatives to present a realistic trial plan. *See Zinser*, 253 F.3d at 1189; *Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227,

⁸ *Godden v. Marigold Foods, Inc.*, No. C8-97-932, at 2-4 (Minn. Dist. Ct., Ramsey Co., Mar. 20, 2000) rejected a proposed class of consumers who bought milk at retail stores, emphasizing the complexity of the state's milk markets and distribution system. *Ludke v. Philip Morris, Inc.*, No. MC 00-1954, 2001 WL 1673791 (Minn. Dist. Ct., Hennepin Co., Nov. 21, 2001) refused to certify a class of retail purchasers of cigarettes because, the frequency of purchases of cigarettes, and absence of records of the purchases, made it impossible to determine damages by common proof or administer a claims process. *See also Fish v. Microsoft Corp.*, Case No. 00-031126-NZ (Mich. Cir. Ct., Wayne Co., Apr. 8, 2004) (regressions using retail data rejected as not adequately capturing market realities and only proving average harm to the class); *see also Ren v. Philip Morris, Inc.*, No. 00-004035-CZ, 2002 WL 1839983 (Mich. Cir. Ct., Wayne Co., Jun. 11, 2002). Similarly, the court in *In re Methionine Antitrust Litig.*, No. 00-1311, 2003 WL 22048232, at 10 (N.D. Cal. Aug. 26, 2003) decertified an indirect purchaser class because the plaintiffs' expert was unable to offer a damages model that reflected the market dynamics.

1 1234 (9th Cir. 1996). Plaintiffs submitted no such plan here, and have not shown that treatment is
2 superior to other alternatives. *See* Fed. R. Civ. Proc. 23(b)(3)(D).

3 This opposition brief highlights the dizzying array of claims that would be presented by
4 Plaintiffs. DRAM makes its way from the Defendants to end users through a wide array of
5 resellers from module makers to computer makers to distributors to retailers and, at each of these
6 stages, to governmental purchasers. The proposed class members purchased under widely divergent
7 and varying methods. The prices of these various products did not move in concert. And the
8 proposed class period encompasses nearly five years, including long periods when prices were not
9 affected.

10 Compounding all of these problems, only a tiny fraction of the purchases can be documented
11 at this point – up to ten years after the fact. The California Court of Appeal in *B.W.I. Custom Kitchen*
12 *v. Owens-Illinois* permitted certification of an indirect purchaser class over an objection of
13 unmanageability only because the class consisted of businesses who would have records of their
14 purchases. 191 Cal. App. 3d 1341, 1354 (Cal. Ct. App. 1987). If this class even has records, they
15 have refused defendants' repeated requests to produce them – and, indeed, the putative class
16 representative for New Mexico affirmatively destroyed what records they had, after this litigation
17 started.

18 IV. CONCLUSION

19 Defendants request that this Court deny plaintiffs' motion for class certification or, in the
20 alternative, certify only a narrowly tailored class of California governmental entities who indirectly
21 purchased DRAM modules during the class period.

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10 **ATTESTATION OF FILING**

11 Pursuant to General Order No. 45, Section X(B) regarding signatures, I, G. Charles Nierlich,
12 hereby attest that concurrence in the filing of Defendants' Opposition to Plaintiffs' Motion for
13 Certification of California and New Mexico Governmental Entity Classes has been obtained from
14 Defendants Infineon Technologies AG, Infineon Technologies North America Corporation, Hynix
15 Semiconductor Inc., Hynix Semiconductor America Inc., Mosel Vitelic Corporation, Mosel Vitelic
16 Inc., Nanya Technology Corporation, Nanya Technology Corporation USA, Elpida Memory, Inc.,
17 Elpida Memory (USA) Inc., and NEC Electronics America, Inc. that have provided conformed
18 signatures above.

19 /s/ G. Charles Nierlich

G. Charles Nierlich

21 100388165_6 (Revised Draft DRAM AG Class Cert Opposition).DOC